Community Land Trusts
Cattle disease and tabular valuations
Diversification of a tenant’s business in Scotland
Nitrate Vulnerable Zones: Be thankful for small mercies
Live & Learn – Compliance issues for migrant workers
PLANNING

Community Land Trusts: matching people to suitable property
A look at some of the issues of affordable housing and rural planning raised by the Taylor Review

NITRATES

Be thankful for small mercies
Carl Atkin assesses the latest revision of the UK’s Action Programme for Nitrate Vulnerable Zones

ANIMAL WELFARE

Cattle disease and tabular valuations
Tim Russ, who acted in the Partridge Farms case, considers the issues and the consequences

SCOTTISH PERSPECTIVE

Diversification of a tenant’s business
Adèle Nicol highlights a lacuna in the Agricultural Holdings (Scotland) Act 2003

ALA: THE NEXT GENERATION

“... you’re gonna do what...?”
Just what is Rosanne Green going to do? It’s all in a good cause ...

LIVE AND LEARN (ALA STUDENT/TRAINING SECTION)

Compliance issues for migrant workers
As migrant workers become more difficult to find, the rules for employing them equally become more complex, as Lynne Ingram explains

BOOK REVIEWS

Agricultural Law, 3rd edn. by Christopher Rodgers — reviewed by Angela Sydenham

OTHER FEATURES

Geoff’s Geottings
Autumn Conference papers
Forthcoming events
Statutory Instruments
Brussels Update

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Community Land Trusts: matching people to suitable property

“Are you asset rich but cash poor?” According to ALA member Pam Johns from Coodes in Holesworthy, that is a question farmers have faced for generations, but perhaps never more so than today.

Commodity prices may be higher than for the last few years – although current indicators show that they are descending and may be close to former levels before long – but increases in fuel, fertiliser and other inputs have, in some cases, more than swallowed the benefits that may have brought.

An opportunity exists, however, for farmers and landowners in rural communities to ‘put something back’ by making land available for affordable housing. By using the Exception Site procedure, land on the edge of a town or village, which would not normally be considered for residential development may be given permission where the houses are classed as ‘affordable’.

Crisis in rural planning

Affordability of rural housing has been highlighted recently in a review by Matthew Taylor, MP for Truro & St. Austell, whose constituency contains the least affordable housing in the country. Affordability is calculated by reference to the ratio of the lower quartile house price to the lower quartile income in the district. In the most severe cases this can be as high as 13:1.

The headline message is that there needs to be a greater effort devoted to providing opportunities for local people to find quality work and build small businesses. As Mr. Taylor points out in his foreword: “The English countryside is a wonderful place to live and work – if you can afford a home, if you can find a reasonably paid job”.

Evidence shows that those in power, both nationally and locally, have a limited understanding – or none at all – of the current state of the rural economy and the needs of rural people. While similar percentages of people work in similar sectors in both urban and rural areas – manufacturing, wholesale/retail trade, property, health and social work, construction and hotels/restaurants – the difference is in size of business.

Rural people are far more likely to work in small or micro-businesses than their urban counterparts, and a much greater proportion of them work from home, perhaps linked by technology to a central location elsewhere: 31% in rural areas compared with 8% in towns.

A total of 48 recommendations are presented by the Taylor Report, all of them focused on one aspect or another of the planning system, its ethos and procedures. Principal barriers include:

- inadequate consideration of rural housing and business needs in development of local planning policy;
- inadequate use of the Regional Spatial Strategies and Local Development Frameworks in their application to rural housing and business;
- shortfalls in capacity of local authorities;
- unsatisfactory thresholds for affordable housing contributions;
- the cost of meeting the Code for Sustainable Homes building standards in respect of affordable housing;
- the need for a better system of negotiating planning obligations than through s.106 agreements;
- the need to reconsider the role of the Planning Inspectorate in policy formation.

New frameworks, old attitudes

The Planning and Compulsory Purchase Act 2004 introduced a requirement for Regional Spatial Strategies and Local Development Frameworks to replace the former Structure and Local Plans respectively, but there is little evidence of any philosophical change from what went before. Attitudes are still too urban-centric and the lens through which applications for perfectly sustainable rural projects is distorted.

Indeed, an expression which crops up at regular intervals in the Review is “the sustainability trap”. The Brundtland Report in 1987 for the World Commission on Environment and Development – Our Common Future – defined sustainable development as “development which meets the needs of the present without compromising the ability of future generations to meet their own needs”.

This requires a balance between and integration of the social, economic and environmental components of their community, meeting the needs of existing and future generations and respecting the needs of other communities in the wider region or internationally to make their own communities sustainable.

To that end, PPS1: Delivering Sustainable Development sets out a requirement that authorities should integrate social, environmental and economic objectives within their plans and calls for a Sustainability Appraisal.

Yet too often, says the Taylor Review, local interpretation of national planning guidance focuses too narrowly on the environmental considerations – such as reduced energy use, specifically transport emissions – at the expense of the social and economic.

The Review relates tales that many of us could tell from our own experiences. Local people being driven from villages by inability to afford the prices being paid for property by incomers from the local town; resulting closure of shops, Post Offices and other local businesses; planning officers hidebound by interpretations of ‘sustainability’ which militate against the sort of activity which is intended to sustain the wellbeing of rural communities.

The latter in particular produces some absurd results, such as the refusal of permission for home extension to provide office space, where the same extension for residential use would readily be agreed. Often planners are reluctant to permit Exception Sites unless the community already satisfies their ‘sustainability criteria’ by having a shop, school and public transport, for instance, the very absence of which is often behind the need for affordable housing and the Exception Site in the first place.
Exception Sites and Community Land Trusts

As Pam Johns explains, the term ‘affordable’ should not be confused with social housing. By use of a Community Land Trust, set up by and for local people, an element of control in the allocation of housing can remain with the local community.

She was involved in 2005 in setting up the Holesworthy Community Property Trust which has so far provided eight homes for local people on a 70:30 equity sharing basis. Funds to finance the equity share can be raised against the site value from equitable lenders such as The Charity Bank.

Technically, the Community Land Trust (CLT) is an umbrella term which covers a number of standard structures which can be used for a social interest project.4

The Housing and Regeneration Act 2008, s.79, yet to be brought into force, recognises a CLT as a body established for the express purpose of furthering the social, economic and environmental interests of a local community by acquiring and managing land and other assets in order:

(a) to provide a benefit to the local community, and
(b) to ensure that the assets are not sold or developed except in a manner which the trust’s members think benefits the local community.

It must, further, be established under arrangements which are expressly designed to ensure that:

(a) any profits from its activities will be used to benefit the local community (otherwise than by being paid directly to members),
(b) individuals who live or work in the specified area have the opportunity to become members of the trust (whether or not others can also become members), and
(c) the members of the trust control it.

In those conditions, “local community” means the individuals who live or work, or want to live or work in a specified area.

New slant on an old idea

As Jennifer Aird, Research Assistant in Community Land Trusts at the University of Salford, explains, the concept has its roots in the 19th Century ‘Garden City’ movement in Britain and the likes of the Victorian social commentator and reformer John Ruskin and the Cadbury family, who were responsible for the Bourneville Estate in Birmingham, still known for the extent of its regulatory covenants designed to ensure the retention of the area’s original character.

The modern concept was developed in the USA in the 1960s as a response to rising housing costs, limited space for new construction, a growing number of abandoned buildings and an aging housing stock in eastern cities. The use of trusts was designed to remove land inflation factors from housing costs.

Legal character

In terms of legal structure, a CLT is a body corporate, with an independent identity. It may be a company limited by guarantee, an industrial and provident society or a community interest company and may or may not have charitable status. The choice will, as always, depend on the individual characteristics of the case.

A particular feature of a CLT is the ability to create an ‘asset lock’, by which the assets are retained. This may be achieved by rules prohibiting a return on equity investment, preventing the distribution of profits or assets, requiring a special majority for certain rule changes, or by a requirement to obtain consent of the Financial Services Authority (FSA), the CIC Regulator or Charity Commission to any rule change.

“The number of trustees and the definition of ‘locality’ is for each CLT to decide”, says Jennifer Aird. “Local people’ usually means those who live or work within a specified geographic boundary.” Often, the board will be made up of residents of the properties, residents of the wider community and representatives drawn from key public sector stakeholders or advisers. The proportion of each is up to the CLT to determine.

Similarly the definition of ‘affordability’ is determined on a case-by-case basis. That and the housing allocation policy will usually be established in conjunction with the local authority.

For example, in the case of the Holesworthy Trust, income levels must be between £15,000 and £26,000 and other criteria have to be satisfied: the applicant –

- must be unable to afford a property on the open market;
- must have a household need suitable for the home being applied for; and
- must demonstrate that they can afford the equity share they ask for.

Other matters such as local connection, local employment, local residence and family connections are used as ‘tie breakers’ to ensure, in Pam John’s words, that “the right people are matched with the right property”.

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1 Pam Johns can be contacted on (01409)253425 or by email at pam.johns@coodes.co.uk.
3 Available from www.un-documents.net/wced-ocf.htm
4 More information on Community Land Trusts, including technical guidance, model constitutions and other resources, is available at www.communitylandtrust.org.uk
The suggested annual increases of 1% between now and 2015 have been criticised as inadequate. Opinions vary from a body of support in favour of retention of the milk quota system as, to the Italians, who are wanting a 10% per annum increase in quotas.

Once again, the market orientated approach of the Commission would suggest that the abolition will go ahead and it will be the degree and pace of change that will be adapted.

Other areas of disagreement also remain and the general rule of policy- and law-making applies, that what you get out of the process doesn’t necessarily look like what you put in.

A political agreement is hoped for at the November Agriculture Council meeting, with a view to the reforms being in place for the 2009 scheme year. But, as so often before, we shall have to wait and see.

SPS and ELS expansion

Whilst the politicians argue the toss over the Health Check, other modifications are taking place in the implementation of the Single Payment Scheme at home.

Two changes were announced in the summer which will take effect in 2010. First, the Hill Farm Allowance is to be replaced by an Uplands Entry Level Stewardship (UELS) scheme intended to focus on the environmental benefits delivered by hill farmers; and, secondly, the incorporation of the fruit and vegetable and wine schemes into the SPS will mean a new allocation of entitlements for affected growers.

The UELS, as its name indicates, is to be a new division of Environmental Stewardship sitting within the existing ELS. Farmers will need to register for ELS and be subject to that scheme before they are able to participate in UELS.

Holdings will be divided into four categories: those in Severely Disadvantaged Areas above the Moorland Line and 15ha or larger; those in SDA Moorland less than 15ha; those in SDA below the Moorland Line; and the remainder. Points targets for the existing ELS and the new UELS will be combined.

In the first category, the overall points target will be 20 per hectare, in the second and third, 63. The fourth category will, almost by definition, not be eligible for UELS. Payment will be made at £1 per point for those who meet the targets.

As with ELS, farmers will choose from a menu of options, including maintenance of boundary structures, prevention of the spread of bracken, retention of scrub and of rock outcrops, plus, for those above the Moorland Line, control of grazing density and supplementary feeding.

DEFRA is putting the final touches to the scheme and will announce full details presently.

Following the subsumption of the relevant EU schemes into the SPS, new entitlements are to be available for growers of vines, nursery crops and permanent fruit and vegetable crops, including orchards, with effect from 2010. They will yield a flat rate payment only.

Applications will be taken in 2009 from farmers who can show that the relevant crop was present on their ground between 1st January and 31st July 2008 for vines, 30th September 2008 for other crops. Details are in Information Note 2, available from the RPA website.

No set aside; more cross compliance

The potential for additional cross compliance burdens, at least for those in England, comes from the proposed abolition of set aside as part of the Health Check.

Concerned at the potential loss of the environmental benefits of set aside, DEFRA commissioned a High Level Group, chaired by Sir Don Curry, to investigate. That group reported in July (see www.defra.gov.uk/farm/policy/sustain/deliverygroup/).

Although the evidence to date relies only on surveys of farmers’ intended behaviour and on unvalidated data from 2008 SPS applications, the Group has presented three policy options. Each would require an increase in the size of buffer strips and part of a holding to be placed in “environmental management”.

Although the basic management requirements would not require land to be taken out of production, the possibility is mentioned of ‘top-up’ options under ELS for “more demanding environmental management”, which would not be capable of being performed unless the land were set aside. In any case, breach of the requirements would become an additional element of cross compliance.

So far, DEFRA has confirmed only that arrangements for the change cannot be put in place until 2010, although Hilary Benn’s response does indicate his preference for the option requiring the larger area of land out of production.
NITRATES

Be thankful for small mercies

Carl Atkin, Bidwells Agribusiness, Cambridge

The Nitrates Directive, Regulation 91/676/EC, was adopted by EU Environment Ministers on 12th December 1991. Article 1 states that “this Directive has the objective of reducing water pollution caused or induced by nitrates from agricultural sources and preventing further such pollution”.

Few would argue that this is a laudable objective. Most commentators agree that nitrates are a serious problem, causing, amongst other things, eutrophication of water and adding substantial costs to the treatment of drinking water. The Department for Environment, Food and Rural Affairs (DEFRA) estimates that Agriculture contributes 60% of the nitrates found in surface water in the UK. Yet many have constantly criticised the basis and modus operandi of the Directive since its inception.

The Directive has proved to be one of the most “universally unpopular” pieces of EU Legislation according to DEFRA itself and has caused embarrassment to several Member States, including those with a usually “squeaky clean” record of transposing and implementing EU Legislation. But just where did it come from, what is it trying to achieve, and is it really fundamentally flawed?

The key drivers behind the Directive are two other pieces of EU Legislation, namely the Drinking Water Directives of 1980 and 1998 which require drinking water to have a nitrate concentration of less than 50mg/l (Council Regulation 80/778/EC)2: the Nitrates Directive

The Nitrates Directive requires Member States:

- to establish an Action Programme of measures for the purposes of tackling nitrate loss from agriculture (art.5) – the Action Programme is required to be applied either within Nitrate Vulnerable Zones (NVZs) or throughout the whole country at the option of the Member State. One of the more controversial measures which must be included in the Action Programme is “the amount of livestock manure applied to the land each year, including by the animals themselves, shall not exceed a specified amount per hectare. The specified amount per hectare [shall] be the amount of manure containing 170kg Nitrogen” (Annex III, para.2);

- to designate as NVZs all land draining to waters that are affected by nitrate pollution (art.6);

- to review the extent of their NVZs and the effectiveness of their Action Programmes at least every four years and to make amendments if necessary.


The Ministry of Agriculture, Fisheries and Food (MAFF) and the Department of the Environment (DoE) dragged their feet over implementing the Directive in England and Wales.

It was not until March 1996 that the appropriate regulations4 – designating eight per cent of England (some 600,000 hectares) as NVZs – was passed. An Action Programme was introduced for England and Wales two years later³. Similar arrangements were made in Scotland and Northern Ireland.

Neither English farmers nor the European Commission were amused at the UK’s laissez-faire approach. A group of farmers in Essex and Suffolk took MAFF and the DoE to the European Court of Justice in 1999³ on the grounds that in assessing areas for designation as NVZs they had failed to differentiate between pollution caused by agriculture and that arising from other sources. Farmers were, it was said, being asked by the Action Programme to clean up pollution created by others.

Then, in December 2000⁷, the ECJ ruled that the UK had failed adequately to implement the Directive because it had focused on deep ground waters used for the abstraction of drinking water, rather than considering all surface and ground water. As a result in October 2002 DEFRA (the successor to MAFF and DoE) applied the NVZ designation to a further 47% of England, bringing the total area to around 55% by the beginning of 2003.

However, the Commission was still not satisfied and again indicated in 2003 it was unhappy with the implementation of the Directive in the UK: this time it was specifically the 170 kg N/ha limit, which the UK was neither operating nor seeking a derogation from. The UK had also failed to undertake a review of the Action Programme in 2002, arguing that it had “insufficient data” to do so.

The UK’s situation was not unique: at the end of 2006, infringement proceedings were also outstanding against Belgium, Germany, Spain, Ireland, Italy and Portugal and were subsequently started against Luxembourg during 2007.

Fundamentally flawed?

The main controversy surrounding the Directive is the lack of flexibility in implementation. It is often compared to the newer Water Framework Directive⁶ (WFD) which provides a framework (as the name suggests) to achieve the goals of the Directive but leaves much of the detail of implementation to Member States.

The Nitrates Directive, on the other hand, imposes prescriptive rules in an attempt to

“Neither English farmers nor the European Commission were amused at the UK’s laissez-faire approach to implementing the Directive”
achieve its aim of reducing nitrate pollution from agriculture. The House of Commons EFRA Report notes “the scientific justification for the figures … specifically the 50mg/litre limit for nitrates in surface and ground waters and the 170kgN/ha whole farm limit for nitrogen manures – is at best unclear” and calls for a fundamental Commission review of the basis and implementation of the Directive in the first place.

This looks unlikely in the foreseeable future, leaving DEFRA little choice but to act within the current framework.

The 2007 consultation

In 2006, DEFRA completed a review of action taken to implement the Nitrates Directive in England, including the extent of current NVZs and the effectiveness of the current Action Programme. This review highlighted the need for further action if DEFRA was to meet its obligations under the Directive and a consultation was launched on 21st August 2007 which invited views on:

- proposals for revised Action Programme measures to control pollution caused by nitrogen from agricultural sources;
- whether to apply these measures within discrete NVZs (as revised) or throughout the whole of England.

The consultation sought comments in relation to six broad issues:

- Targeted designation of NVZs versus a ‘whole country’ approach;
- De-designation of some existing areas;
- Proposed changes to the Action programme;
- Regulatory Impact Assessment;
- Advice and support;
- Anaerobic digestion.

By the time the consultation closed in December 2007, 609 different responses had been received. Some of the highlights included:

- 77% of the responses favoured the targeted designation of NVZs versus a ‘whole country’ approach;
- De-designation of some existing areas;
- Proposed changes to the Action programme;
- Regulatory Impact Assessment;
- Advice and support;
- Anaerobic digestion.

DEFRA remains convinced, despite strong lobbying, that the evidence supporting the proposed closed periods is robust and it does not intend to alter their length. However, it does intend to remove the higher rainfall band and align the closed periods end dates according to soil type. A new exemption for registered organic producers will be provided and it intends to introduce some additional restrictions on spreading following the end of the closed period to prevent the risk of a so-called ‘National Muck Spreading Day’ at the end of closed periods. The closed periods for slurry and poultry manures are as per the table below.

At the request of the European Commission DEFRA will also be undertaking further research regarding leaching losses of nitrogen from applications of organic manure made during January. This will be used to inform the next review of the Action Programme, including whether the closed period should be extended to include the whole of this month.

Capacity of storage vessels

DEFRA views this measure as critical to implementation of the Action Programme and does not intend to reduce the proposed capacity required of six months for pig slurry and poultry manure, and five months for cattle slurry. However, it intends to introduce a new exemption allowing farmers to take account of the amount of manure that can be spread to “low risk run-off land” on the farm. DEFRA also proposes increasing the implementation time allowed for this measure from two to three years.

Planning applications of nitrogen fertiliser and N max

DEFRA intends to make a number of minor refinements to this measure including providing greater clarity in relation to the production of a

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<th>Grassland</th>
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<td>Sandy or shallow soils</td>
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<td>Other soils</td>
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Proposed closed periods for manure spreading
nitrogen fertiliser plan, reducing the N max limit for grass by 30kgN/ha, and amending some of the permitted adjustments to the N max limits.

**Whole farm limit for livestock manure**

This measure will be implemented as proposed in the consultation (i.e. 170kg/ha). However, DEFRA has reiterated its commitment to urgently apply for a derogation from this limit. As examples, currently the Netherlands has a derogation of 250kg/ha and Austria and Germany 230kg/ha.

**Advice, support and financial incentives**

A package of advice will be provided, including workshops and a helpline, to support farmers in making changes. DEFRA also points out there are a number of potential existing sources of financial support available to farmers which could be used to help with implementation of the Action Programme measures including, for example, the England Catchment Sensitive Farming Delivery Initiative (ECSFDI) and the Rural Development Programme for England (RDPE).

Slurry storage facilities are understood to be eligible for tax allowances on capital costs up to £50,000 per year. Slurry pits also qualify for allowances in their own right under the Capital Allowances Act 2001.

**Other points**

- Maps of NVZs and guidance on the Action programme measures will be published alongside the Regulations in September 2008;
- DEFRA is developing plans for appeals against designation, which will commence in January 2009.

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**Industry reaction**

The NFU called the proposals a “partial victory” estimating that the gains to farmers as a result of their lobbying were about £100 million per annum with a reduction in capital investment required of about £50 million.

The major “victory” was the removal of the requirement to have cover crops on bare land – now dropped entirely from the action plan.

The derogation on the 170 kg/ha limit is likely to be completed by March 2009, although it has been indicated that compliance with the 170 kg/ha of nitrogen figure on grassland would not be enforced until 2010 anyway.

The new regulations are expected out in September 2008 with the new Action Programme running from January 2009 for existing NVZs and January 2010 for new NVZs. A period of grace will be allowed for the slurry and manure storage meaning full compliance will probably not be expected until 1st January 2012.

**Conclusion**

The pragmatic outcome of the new Action Plan can probably be described as fair and, despite many concerns over the operation of the Directive, in reality the UK Government had little choice but to act. Whilst the UK is by no means the main flouter of the regime, we still operate a considerably more liberal regime than some other EU Member States. Whilst we can point to plenty of other examples of excessive DEFRA red tape, perhaps in this instance we should be thankful for small mercies.

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1. See ec.europa.eu/environment/water/water-nitrates/directiv.html
2. See eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31980L0778:EN:HTML
3. See www.parliament.uk/parliamentary_committees/environment_food_and_rural_affairs/efra_nitrates_directive.cfm
4. Protection of Water Against Agricultural Nitrate Pollution (England and Wales) Regulations 1996 (S11996/888)
5. See Action Programme for Nitrate Vulnerable Zones (England and Wales) Regulations 1998 (S11998/1202)
6. R (Standley & Metson) v MAFF/DoE – Case C293/97
7. Commission v UK – Case C69/99
10. The draft statutory instrument is available at www.defra.gov.uk/environment/water/quality/nitrates/pdf/consultation-supportdocs/draft-si.pdf
Cattle disease and tabular valuations

Tim Russ, Clarke Willmott, Taunton

Since the turn of the year, I have been involved with two important cases on the powers of government in relation to the control of bovine TB ("bTB"). *R (Higher Burrow Organic Faming Partnership) v Secretary of State for the Environment Food and Rural Affairs* dealt with matters arising out of the gamma interferon blood testing process; and *R (Partridge Farms Limited) v SSEFRA* dealt with the tabular valuations of infected animals.

**EU law**

The applicable EU law divides into two parts: first, the law prescribing in detail how testing is to be carried out and also how to determine when a herd of bovines is to be determined as officially bTB free; secondly, what a Member State needs to do to qualify for funding in connection with its bTB elimination plan.

Council Directive 64/432 of 26th June 1964 defines in precise detail how testing is to be carried out with a view to the EU herd becoming, at some point, bTB free. It prescribes skin testing as the principal weapon in the tester’s armoury. By virtue of Council Directive 1226/2002 of 8th July 2002, a blood test known as the gamma interferon test ("the blood test") is also permitted to be used by Member States.

The Council Regulations controlling cost recovery are 77/391 and 78/52. The 1977 Regulation is directed towards improving the state of health of livestock. By art.3, Member States must draw up plans for accelerating the eradication of bTB in their territories.

The regulatory aim is that, on completion, herds are classed as "officially tuberculosis-free" in accordance with Directive 64/432/EEC, which essentially requires herds to test negative to two successive skin tests.

**English law**

The Minister’s powers in relation to livestock culling derive from s.32 Animal Health Act 1981. This permits the slaughter of animals which are affected or suspected of being affected with any disease to which the section applies or have been exposed to any such disease. Compensation is payable “in accordance with scales prescribed by order” (subs(3)).

Section 32 applies to bTB by virtue of para.4, *Tuberculosis (England) Order 2007*. At the time of both the *Partridge* and the *Higher Burrow* cases being issued the earlier Tuberculosis (England) Order 2006 was in force which was in similar terms.

Both Orders replace the previous system of valuing livestock using independent valuers with a system of so-called table values. The value paid by way of compensation to the owner of an animal culled as having bTB will be in most cases be fixed at a sum set out in a table divided into some 47 categories relying on factors such as age, sex, whether the animal was pedigree or not, as well as Beef or Dairy.

This sought to further DEFRA objectives to eliminate subjective factors from the valuation process in accordance with DEFRA’s perception that extensive overvaluation was going on prior to the 2006 Order being introduced in February 2006.

The facts of Partridge

The claimant had eight cattle taken under a bTB cull in February 2006. He contended that the scale values paid for the stock under compensated him for some by three times. In support, he produced extensive documents showing that a clear view had emerged prior to the 2006 Order being made that Higher Value livestock were a special case and needed to be dealt with separately. This was, it would appear, accepted even by DEFRA in the Regulatory Impact Assessment process, up until the statement issued immediately before the Order was made when all mention of Higher Value livestock mysteriously disappeared.

Mr. Partridge argued that this discriminated against the owners of higher value stock.

Arguments and judgement

The claimant relied on much of the disclosure that it had obtained from DEFRA in the two years or so that the case had taken to get to trial to show that:

- there was clearly a body of animals that could easily be defined as “higher value”;
- the DEFRA pre-legislative consultation had indicated a clear desire in the industry for such animals to be subject to a separate valuation regime but no agreement as to which one should be adopted;

- the whole point of the table value was so that the value being paid by DEFRA approximated (but was not to be precisely equivalent) to market value;
- thus the discrimination inherent in the operation of the Order was obvious;

The department’s arguments were more complex, especially on the issue of objective justification in the event the court found there to have been discrimination.

To summarise a complex case, DEFRA claimed:

- the animals being culled were in reality not worth very much, if anything at all (because they were diseased), so it did not matter that the sum being paid was less than they were worth as healthy;
- any owner whose animals were worth more than the table value should insure the livestock against the cost of replacement as a matter of prudent business practice;

- such insurance was in most cases readily available;
- the alternatives to the currently scheme involve too much expense or the use of valuers who have proved to over value in the past and this justifies the approach taken in bringing Higher Value livestock within the ambit of the table values.

The judge determined to deal with the case on the EU law in relation to the discrimination argument as this was the easiest for the Claimant to establish. Thus he did not consider the English law argument as to irrationality.

Having considered the extensive lay and expert evidence as to what had happened prior to the 2006 Order being made and, in particular, the practical effect of the Order on the 11% of animals found to be worth more than 50% more than the average and on the 6% found to be worth more than twice the average, he had no hesitation in finding that the Order discriminated against the owners of Higher Value livestock following the well known case of *Klensch*.

**Objective justification for discrimination**

Having found that discrimination existed Stanley Burnton LJ went on to consider whether DEFRA could justify it objectively. The department put forward eight arguments as to why the
discrimination was justified (the seventh of which had itself seven sub-arguments). Space does not permit detailed analysis, but it is noteworthy that many of the points made were accepted by the judge as being correct but were found not to justify discrimination.

Permission to appeal was granted on the grounds of general public importance; the appeal is currently at an early stage.

Consequences of judgement
Where does the judgement leave livestock owners?

The trite answer would be “as if we were in 2003 before the consultation on the 2006 Order was begun unless DEFRA’s appeal succeeds”. In practice what ought to happen is that the livestock industry bodies and DEFRA should agree what “Higher Value” means and then implement a scheme for compensating owners of such stock.

Such things as pre-valuation and a scheme of independent valuation funded by a large (around £2,000, for example) access payment were canvassed before the 2006 Order and could be revisited. In the meantime unless and until the appeal succeeds for DEFRA it is submitted that livestock owners with a diagnosis of bTB in their livestock fall into five categories, viz.:

1. Partridge Farms Limited – which company has an express finding that its livestock were of Higher Value and presumably therefore a damages claim can now be pursued within the current action;
2. Other claimants who issued proceedings on similar grounds to Partridge Farms – they are in a similar position, except against them DEFRA may be able argue that their stock was not “Higher Value”;
3. Any owner whose stock have been valued within a period of less than three months from the judgement – they can claim a judicial review of their values and logically should be in the same position as category 2 if they issued in time;
4. Any owners whose stock is culled from the date of judgement in Partridge until (if at all) a new scheme is put in place for Higher Value stock – they should be in an analogous position to categories 2 and 3;
5. Owners whose stock was valued between February 2006 and more than three month before the judgment in Partridge. They are out of time for judicial review\(^1\) and may only have an argument for Francovitch\(^1\) -type damages for failure to implement EU law.

The Higher Burrow case
DEFRA have chosen to deal with new outbreaks in four-yearly testing parishes by using the relatively new gamma interferon blood test which they believe shows up infected animals sooner than the skin test and thus allows them to catch an outbreak sooner.

The claimant in Higher Burrow was an organic diary farming partnership, with a herd of over 400 cattle. The Minister carried out a skin test on the herd as part of a four-yearly testing programme, the claimant’s herd being previously uninfected and in such a parish. In that test one animal had tested positive for bTB.

The DEFRA veterinary staff from Animal Health then at the next due date tested again with both the skin and blood tests. They implemented the policy noted above for four-year testing parishes of using the blood test, in case the one case diagnosed at the last test date was the start of an explosive new outbreak. The results of the blood and skin tests showed 14 positive reactors by the skin test and 86 by the blood test.

Animal Health informed the claimant that it intended to slaughter every animal which had tested positive in accordance with its then policy. It was common ground that organic farmers whose cattle were culled found it more difficult than non-organic farmers to replace the cattle. The claimant applied for a stay of slaughter and an order requiring DEFRA to retest the animals.

The skin test and the blood test both have what are known as specificities and sensitivities, one being a propensity of the test to show false positives and the other a propensity to show false negatives. The sensitivities and specificities of both tests were, the claimant’s veterinary evidence submitted, scientifically well known, and in this case the chances of the tests being congruent with established norms were over 10,000:1\(^1\).

The claimant obtained an injunction to prevent the cull of the 86 animals despite the power
vested in the Mister to cull even if the animals have been exposed to bTB\(^1\) and a speedy trial was ordered.

At the trial the claimant argued that common sense required an order that DEFRA retest the animals, but was unable to say that a retest would definitely produce a different result. The claimant could not point to any failure of testing protocols but submitted the veterinary evidence was compelling that “something must have gone wrong”. Under Council Directive 64/432, testing may only be carried out by the Member States, so the claimant could not test the animals himself.

DEFRA argued that the evidence was consistent with an explosive outbreak of bTB and that prudence required a cull and, further, that no conflict of scientific evidence should be considered by a court in judicial review\(^1\). Mitting J acknowledged the significant financial costs which the claimant would suffer if culled, not only in terms of the value of the stock which would be paid out on table values which were significantly less than actual values, but also in respect of the loss of income from the organic milk and the claimants’ inability to source replacements. However, he found that if a positive result was found in an animal there was a clear obligation on the Minister to cull that animal.

If the test was found to be faulty – which he defined as the claimant being able to show that the testing protocols had not been followed\(^1\) or if the claimant could show that a retest would produce a different result, then he would have been happy to order a retest. On his analysis, the policy adopted by DEFRA was rational and the cull should take place. He refused leave to appeal.

The effect of his findings is that it is not sufficient to prove a divergence from the testing protocol to show incongruence of specificity and sensitivity. Faced with an expedited appeal, the need for a further injunction to stay the slaughter in the meantime and being shut up on bTB restrictions for a further period because no retests would be carried out by DEFRA whilst the litigation subsisted, the claimant submitted to judgement and allowed its animals to be culled.

The other claimants – who had issued proceedings and had them stayed and who had hoped that Higher Burrow would resolve their similar problems – were faced with having to fight a judicial review where permission would in view of Higher Burrow almost certainly have not been given and the case would almost certainly have to be fought to the Court of Appeal even if it was granted. In view of this they also elected not to proceed.

**Conclusions**

These cases show the range of judicial attitudes that can reasonably be adopted in relation to a challenge to government action. They also show the risk that a claimant takes when issuing judicial review proceedings. Neither claimant would have got very far without the assistance of the NFU. The **Higher Burrow** case advanced by the claimant was in hindsight just but the policy was still held to be rational.

On the basis of Mitting J’s findings, livestock farmers should, as a counsel of perfection, obtain the Animal Health testing protocols and watch (and preferably video) the tester closely when a blood test in particular is being carried out to watch for non-compliance with protocols, notwithstanding that this is impractical and likely to antagonise Animal Health staff.

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1. [2008] All ER (D) 230
2. [2008] EWHC 1645 (Admin)
3. SI2007/74
4. SI2006/168
5. The material difference being that the 2007 SI introduces pre-movement testing
6. See Brucellosis and Tuberculosis (England and Wales) Compensation Order 1978 (as amended)
7. Individual valuation applies where no or insufficient market evidence is available in a particular month
8. [1986] ECR 3477, which determined that Member States may not implement a measure in a way that would be likely to create, directly or indirectly, discrimination between producers
9. See CPR part 54.5 (1) (a) and (b)
10. Francovitch and Bonifaci v Italy [1992] 1 RLR 84
11. In other cases issued after **Higher Burrow** on similar facts, which were stayed to await its outcome, the evidence was that the chances of congruence was as little as 130,000,000:1.
12. See s.32 Animal Health Act 1981, above
13. Following R (Eastside Cheese) v Minister of Health [1997] EWCA(Civ) 1739 and Lynch v General Dental Council [2004] 1 All ER 1159
14. For example, that the blood was not kept at the right temperature or there had been contamination of the sample at the laboratory.

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**Autumn Conference papers**

**ALA’s Autumn Conference in September** lived up to the high standards that we have set ourselves, due in no small measure to the excellent array of speakers who kindly gave their time and expertise.

The range of topics, whilst none of them lived up to the high standards that we expected, covered a broad range of matters.

Andrew Shirley, National Access Adviser to CLA, began the day with a review of the present position on the English coastal access path. Although at the time of his talk, the government’s response to the consultation exercise was awaited, it has since materialised and proved Andrew’s degree of prescience. The absence of an appeals procedure against designation was a serious concern, as it should continue to be to all coastal landowners and advisers.

Edward Perkins, chartered surveyor from Haverfordwest and a leading figure in Welsh affairs for RICS, talked about the position on cattle TB and the proposed cost-sharing arrangements on animal welfare. The comparison between the Welsh position and that in England was worth noting.

Andrew Clark, NFU’s Head of Policy Services, spoke on the questions of rural flooding – or ‘re-wetting’, to use the government’s euphemism – in the context of increased summer rainfall. The issues are of concern to all with clients near settlements, who might be affected by new responsibilities.

The morning session rounded off with a talk in his inimitable style by Andrew Campbell from Clarke Willmott. With the arrival of the Community Infrastructure Levy, it may be that landowners intending development will need to revise their usual modus operandi to avoid an untimely tax bill.

After lunch, Paul Rice, ALA Council Member from Wright Hassall, and Jonathan Armitage of Stratton, ran through the CAP Health Check proposals, both as to theory and likely practical effect. David Altaras from 36 Bedford Row concluded proceedings by examining the Planning Bill, currently in Parliament, for its likely effect on major projects of national significance.

Transcripts of the talks are being finalised and we expect to have them for sale shortly, along with the supporting Conference papers.
SCOTTISH PERSPECTIVE

Diversification of a tenant’s business

Adèle Nicol, Anderson Strathern, Edinburgh

It is probably safe to say the Agricultural Holdings (Scotland) Act 2003 has not met with the universal approval of either landlords or tenants. The provisions of Part 3, permitting tenants to diversify into non-agricultural activities, were perhaps amongst those most welcomed by tenants and of which landlords were most wary.

The intention behind the legislation was to encourage tenants to look to the future and to expand into non-traditional activities such as golf driving ranges, farm shops and adventure playgrounds.

Many tenants were already diversifying: for example, bed and breakfast operations or the use of spare cottages for holiday letting. Existing arrangements were unlikely to have had formal consent.

Two cases on diversification issues

Part 3 might have been taken to give a tenant the right to put such arrangements on a formal, recognised basis and at the same time encourage tenants to diversify, given the limited and rather vague grounds on which a landlord may object.

The Land Court has determined two cases arising out of diversification. Whilst neither gives guidance on the interpretation of the grounds for objection (and thus to clarify the parameters and scope within which tenants may diversify) both, perhaps, indicate that utilisation of Part 3 may not be straightforward.

The first case was that of Cawdor Trustees v Mackay. This case states the position in relation to sub-letting and diversification. Section 39(3) of the 2003 Act provides that, if sub-letting is prohibited and that prohibition prevents the use of the land for non-agricultural purpose, the tenant may, despite the prohibition, sub-let the land but only if the purpose is ancillary to the tenant’s use of the land for the non-agricultural purpose.

This clause has been interpreted, certainly at least by some landlords, as preventing a tenant granting a sub-lease to, say, a windfarm operator as this would be the primary use and not therefore be ancillary to the tenant’s use of the land for a non-agricultural purpose. It is not the tenant who is operating the windfarm but the windfarm operator. All the tenant is doing is granting a sub-let.

The Cawdor case concerned a lease containing power to the landlord to resume at any time any part or parts of the farm. It also contained an explicit power to resume any house not occupied by a farm worker for a period in excess of three months, thus a prohibition on sub-letting.

Of three cottages on the farm, two had not been required for farm purposes for many years but were occupied rent-free by families unconnected with the farm. The landlord decided to take two of the cottages back in hand with the intention of upgrading and letting direct. Following negotiation, the landlord restricted the resumption to one of the cottages only.

The tenant resisted resumption on the basis it would be contrary to the good faith of the lease, arguing that, although he had no current use for the cottage, its loss would limit the flexibility which he would otherwise have to plan his farming operations.

To counter the resumption the tenant served a Notice of Diversification under s.40, proposing to use the cottage for a non-agricultural purpose, namely sub-letting it as a dwellinghouse.

The tenant argued that the exercise of his statutory right to diversify should supersede (or at least restrict) the landlord’s contractual right to resume the cottage. The tenant also relied on s.39(3) to render the prohibition on sub-letting ineffective.

A gap in the legislation

The Land Court held that the proposition that the resumption was contrary to the good faith of the lease could not succeed because the lease expressly allowed resumption of surplus houses.

Significantly for statutory diversification, the Court held that s.39(3) did not apply in this case as sub-letting on its own was not a use of the land for a non-agricultural purpose. Nor was it ancillary to some other use. The contractual prohibition against sub-letting, accordingly, stood.

An interesting side issue considered by the Court was the difficulty of reconciling a contractual right of resumption with the tenant’s statutory right to diversify. It is generally accepted that resumption will not be successful if it is of such an extent that the land remaining in the tenancy is incapable of being economically worked.

The Court considered the theoretical situation where a tenant had conceived – or perhaps even implemented – a non-agricultural scheme and the landlord then sought to take advantage of a resumption clause to adopt that use for his own benefit. The extent of the land affected by the diversified use might be minimal in comparison to the whole extent of the farm, preventing the tenant from arguing fraud on the lease.

The Court did not come to any definite view but suggested that control on resumptions in such circumstances might be achieved by testing the materiality of the resumption and its impact both on traditional agricultural uses contemplated at the time the lease was entered into and the diversified use now permitted by statute. However, it commented that there was no express statutory provision to cover the situation and it could not itself legislate.

The Cawdor case identified a gap in the Act and demonstrated that the Court could not fill it.

A landlord who does not object

The existence of such a gap was reiterated in Grant v The Trustees of the Glengarry Estate Trust, which (amongst other important points) holds that failure by a landlord to object to diversification is not tantamount to consent.

The background is that a tenant wished to construct a micro-hydro scheme. He served Notice of Diversification and whilst objection was
initially made by the landlords this was withdrawn. No conditions were imposed.

Work commenced on the scheme and the tenant approached the landlords requesting them to sign a wayleave in favour of Scottish Power to permit installation of electricity cables and connection to the national grid. It was, in fact, possible for the tenant to lay the cables without the wayleave but at a greater cost and Scottish Power would not assume responsibility for their maintenance.

The landlords did not sign the wayleave on the basis that, whilst they did not object to the diversification, nothing in the 2003 Act obliged them to co-operate positively.

**A positive obligation on a landlord?**

The tenant applied to the Land Court to consider whether the Act imposes any positive obligations on a landlord. The tenant’s case was based on four grounds:

**Ground 1**
The 2003 Act inserts an implied term in the lease that the statutory right to diversify carries any additional rights necessary for the diversification to succeed.

The Court did not agree and indeed commented that, while the absence of such an implied term might make some schemes impossible, it did not make the legislation as a whole unworkable.

**Ground 2**
The landlords’ refusal to co-operate derogated from their grant of the lease, as amended by the Act to permit diversification.

The Court took the view that the statutory provisions had bestowed on the tenant only the right to diversify, nothing more.

**Ground 3**
The Act includes implied consent to the additional rights required.

This followed on from grounds 1 and 2 and having dismissed the first two arguments the Court dismissed this one also.

**Ground 4**
That it is implied by the statutory provisions that the landlord must co-operate with the tenant.

The Court found that the Act placed no implied or positive obligations on the landlord and that if Parliament had intended to do so it would have included specific provisions accordingly.

The Court emphatically dismissed the suggestion that failure to object is equivalent to positive consent. In order for an objection to be upheld by the Court it has to fall within the parameters set out in the Act; simply because a landlord cannot make his objections fall within the constraints of the statutory grounds does not mean he has consented.

**Hypothetical considerations**
The Court considered theoretically the situation where a diversification scheme requires the consent of third parties.

A tenant cannot assume that private water supplies, private roads and the like which he is entitled to use as part of his tenancy are necessarily owned by his landlord. The landlord himself may only have servitude rights, the use of which cannot be increased.

A Standard Security may affect the land and the tenant cannot assume that a lender, whose consent may be required, will co-operate. The Glengarry case concerned an electricity wayleave. There may be schemes which require other consents or permissions such as Section 75 Agreements.

A Section 75 Agreement has to be entered into by the owner of the land. This may mean that some schemes cannot go ahead or cannot be carried out in the most economic way. As in the Cawdor case the Court commented that this may be an omission from the 2003 Act but not one which it was entitled to address.

The result of the Glengarry case is that tenants will have to establish that a diversification scheme and everything needed to make it workable are under their control or to obtain the landlord’s co-operation by agreement.

The Court commented that the latter might cost money. Part of the profits may have to be shared or a one-off payment made, but if the landlord is not interested, even with financial inducement, he cannot be compelled to co-operate.

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1. RN SLC/183/04
2. SLC/82/08
“...you’re gonna do what...?”

Rosanne Green, Latimer Hinks, Darlington

"Are you crazy!..." tends to be people’s reaction when I tell them that I have decided to run in the 2008 New York Marathon. They quickly follow their surprised reaction with the question “Why?”. And so I explain...

Along with our Herd Manager, Barry, I am taking part in the New York Marathon to raise money for Diabetes UK’s research fund – with the aim of helping to eventually find a cure for the condition. Diabetes UK is the charity for people with diabetes, their family and friends. It is one of the leading funders of diabetes research in the UK, spending about £6 million a year and funding around 200 research projects.

Approximately 10½ years ago I was diagnosed with Type 1 Diabetes. I don’t really know how and why, I just know that it happened and I have had to learn to live with it.

Diabetes is a condition where the body cannot use glucose (sugar) properly. If untreated, diabetes can lead to heart disease, stroke, kidney disease, blindness and amputations. It comes in two forms: Type 1 and Type 2. Type 1 diabetes develops if the body is unable to produce any insulin – it is treated by injections and diet (I take five injections a day and try to eat as healthily as possible!). Type 2 diabetes develops when the body can still make some insulin but not enough or when the insulin that is produced does not work properly; it is treated by diet and exercise alone, or by diet and tablets, or sometimes by diet and insulin injections.

Over two million people in the UK have been diagnosed with diabetes and another 750,000 people have diabetes but are completely unaware of it. Every five minutes someone, somewhere in the UK will learn they have diabetes.

People generally want to know what it is like living with diabetes and I always find it difficult to answer this question. Really, I’d like to be able to tell people that it has made very little difference to my life but the honest answer is that it has. I have to think about everything I do and everything I eat; walking the dog, feeding the animals, having back to back meetings at work with no time for lunch, dancing, drinking, house work – these are all things that we do without thinking about it, but if I haven’t accounted for doing these things when I am taking my insulin and eating food it could mean disaster later on. Having too much insulin in the body leads to hypoglycaemic attacks which can be life threatening if left untreated.

The New York Marathon, with typical understatement, proclaims itself as The World’s Largest Marathon. This year’s run will be the 39th and takes place, as usual, on the first Sunday in November (two days before the Presidential Election!). Barry and I will be among the 37,000 participants all pushing themselves to their limits – and in some cases beyond. My target time is 4¼ hours!

Between us, we will be doing all we can to raise awareness of diabetes and hope to raise £5,000 for Diabetes UK.

Details of how to sponsor us are in the box, left. I do hope you’ll feel able to put a few pounds to this good cause. We’ll be grateful for all the sponsorship we can get!
Forthcoming events...

**ALA:TNG WEST MIDLANDS**
20th November 2008
Warwickshire Golf & Country Club, Leek Wootton

**ALA SW REGION meeting**
27th November 2008
Michelmores LLP, Exeter

**ALA:TNG SOUTH EAST**
4th December 2008
Uckfield, East Sussex

**ALA SCOTLAND: MOCK MEDIATION**
10th February 2009
Stirling Management Centre

**AGM & ANNUAL DINNER 2009**
27th February 2009
Royal Over-Seas League, London

**ALA FELLOWSHIP 2009**
24th-26th March and 15th-16th April 2009
Royal Agricultural College, Cirencester

**ALA/WS SOCIETY 12TH ANNUAL JOINT SEMINAR ON AGRICULTURE**
5th June 2009
Signet Library, Edinburgh

**COMITÉ EUROPÉEN DE DROIT RURAL – 25TH BIENNIAL CONGRESS**
Hosted by ALA
23rd-26th September 2009
Queens’ College, Cambridge

Full details of all meetings and other events are posted on the [Calendar of Events](#) on the ALA website, or Members are welcome to contact Geoff Whittaker on (01206)383521 or email [meetings@ala.org.uk](mailto:meetings@ala.org.uk)

IT SHOULD NOT pass without comment that this is probably the longest list of forthcoming events that has appeared in the ALA Bulletin for some time. That is entirely due to the support that you, the Members, are giving to what we do, in particular to the development of the TNG structure, and for that you have our grateful thanks.

I would draw attention to two of the events in particular. As previously advised, the **ALA FELLOWSHIP** continues to take shape and I am delighted to confirm that the first sessions will be held next Spring as indicated above. I am not in a position just yet to confirm the exact final price or to take bookings but I will circulate information by email as soon as possible.

The other event is the **CEDR CONGRESS**, which we have flagged up previously and which ALA is pleased to be hosting for the third time in 2009.

We have need of help in the background work in the run up to the Congress, in particular with generation of sponsorship of one sort and another, and also at the event itself. Volunteers are requested to let me know as soon as convenient!

Please dates in your diaries: we look forward to seeing you.

GDW

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National contacts for ALA:TNG

IF YOU have any questions on how TNG works or how to get involved then please contact:

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In recent years the use of migrant workers in UK agriculture and horticulture has increased significantly due to an inability to recruit from the resident work force.

As a result of new immigration rules, brought in with the introduction of the Immigration, Asylum and Nationality Act 2006 in February this year, employers in these sectors are being targeted by the UK Border Agency to track down workers without permission to work legally in the UK.

Employers face unlimited fines and even imprisonment if they are found to be in breach, and the employee faces being removed from the UK.

Failure of former sanctions

However, sanctions for employing illegal workers are not new, and have been in place for over 12 years. The rules were tightened up in 2004 when employers were placed under a duty to have sight of specific identification documents for each employee. Although the rules were in place, they were not proactively enforced.

The period between 2000 to 2007, saw only 17 successful prosecutions nationally. Contrast this figure with an average of 100 successful prosecutions per month since the rules changed in February this year with fines amounting to a total in excess of £2 million. Further employers found breaching the new rules face being “named and shamed” on the UK Border Agency website.

Many employers in the industry find it impossible to recruit from the resident work force due to a number of factors which include the seasonal and the short term nature of vacancies, perceived low pay, geographic remoteness from major cities and low general unemployment in the UK.

Entry for migrant workers

Previously there were eighty different routes of work to enter the UK. The nationality and the status of the migrant dictated whether they could work and what documentation they should hold to demonstrate this.

Agriculture attracts by far the most diverse group of migrants.

The most popular route to seasonal work has been the Working Holiday Visa scheme, which enables those here for an extended holiday to work during their stay.

It applies only to nationals of participating Commonwealth countries, British overseas citizens, British overseas territories citizens, or British nationals (overseas) who are aged between 17 and 30 and not in a marriage or civil partnership.

A Working Holiday Visa will be granted for two years but, since the work done must be merely a minor part of the overall purpose of the visit, an individual is only able to take up work for a total of 12 months of this two year period.

Employers therefore need to satisfy themselves by having sight of wage slips etc. that the employee is not in breach of this limitation.

Students studying at a UK University are able to take up employment incidental to their studies, and the Home Office interprets this as 20 hours maximum during term time and 40 hours maximum at other times.

The next largest group of migrant workers are citizens of the European Union. EU legislation provides for free movement of workers between Member States, and this was the case for citizens of the EU-15.

However, when the EU expanded in 2004 to include the Eastern European ‘A8’ countries (Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia and Slovenia), the UK was one of only a few Member States that opened its labour market with relatively few restrictions for these citizens.

There was, as the media portrayed, a heavy influx of immigration into the country. Workers from the A8 countries were free to come to the UK provided that they registered with the Home Office under the Workers Registration Scheme within one month of finding employment. That is still the case.

The perceived influx resulted in criticism of the government and, therefore, when Bulgaria and Romania joined the EU in 2007, such citizens generally were only allowed to take up employment if they slotted into the ‘highly skilled’ or ‘shortage occupation’ categories. Agricultural and horticultural positions did not satisfy these requirements.

Seasonal Agricultural Workers Scheme

Even though there has been an increase in immigration over the last four years, employers in the agricultural sector have still struggled to fill vacancies. This year the situation has worsened as fewer A8 citizens are travelling to the UK, many of those that do are taking work in other sectors and workers already here are returning home as their own national economies are strengthening.

The Seasonal Agricultural Workers Scheme (SAWS) was introduced in the immediate post-War years when government wanted to facilitate movement of labour from the continent of Europe to work on the land and, especially, to gather in harvests. Although quotas and detailed rules have changed over time, the principles of the scheme remain as they were when it started.

The scheme enables farmers to recruit low skilled labour from, mainly, outside the EU. Permission is granted for a maximum of six months, being the official interpretation of ‘seasonal’. The minimum period of employment is five weeks.

In order to recruit, employers have to prove that they have enough work for the employee’s participation in the scheme to be worthwhile, although in the present circumstances that is not a high hurdle. The employer also has to ensure that there is clean and sanitary accommodation.
suitable for the number of workers being recruited, that workers will be properly supervised and that Health and Safety Executive legislation and regulatory requirements will be met. The placements have to provide a safe working environment and be risk assessed.

The scheme is administered by four multiple operators and five others acting as agents for the Home Office. Three of the multiples – Concordia (YSV) Ltd., HOPS Labour Solutions and Fruitful Ltd. – operate throughout the UK. The fourth – Sastak Ltd. – is confined to the West Midlands and South Wales. The other five operators have local franchises in Herefordshire and East Anglia.

The scheme operators are responsible for sourcing and recruiting eligible workers; assessing and monitoring the employer’s ability to provide suitable work placements; ensuring the fair and lawful treatment of workers; and making sure that workers are suitable to do the work on offer.

The quota of workers under SAWS has reduced year on year. For 2008, it was reduced to 16,250 places, and restricted to nationals from Bulgaria or Romania. More detailed information on the SAWS scheme can be obtained from the UK Border Agency website at www.ukba.homeoffice.gov.uk.

**Alternative recruitment sources**

Other sources of workers in the agricultural industry include asylum seekers, those granted unlimited leave to remain for humanitarian reasons or spouses and dependants of work permit holders. Each of these categories holds different documentation confirming they are eligible to work.

Asylum seekers have been given the right to work, although their ability to do so has been massively reduced over the last three years. Now, asylum seekers may not work for 12 months after lodging their application for asylum.

Even those who are given permission after that time may not become self-employed and there are limitations on the type of work they may undertake. Again, more information is available from the UK Border Agency website at the address given above.

Those who are granted leave to remain for humanitarian reasons will be given a residence permit which gives the same rights as permanent UK residents.

Work permits are issued for specified work with a specified employer and if the employee wishes to undertake different work, or to change employer, the consent of the UK Border Agency needs to be obtained first.

Police and immigration officers are now working together to proactively enforce the rules and are encouraging the public to inform on businesses who are breaking the law. It is not just agriculture that is being targeted: for instance, catering and care homes are under scrutiny along with other sectors with a tendency to employ a high number of migrant workers.

**Confusing compliance requirements**

Legitimate employers do not oppose the legislation, but there is a strong feeling that the government has not educated the sector on how to comply. There is confusion as to what documents demonstrate that an individual presenting themselves as ready and able to work is eligible to do so.

Confusion amongst employers is not surprising when considered with the different immigration categories for migrant workers, each category requiring different documentation demonstrating eligibility to work in the UK as noted above. Also the Home Office periodically introduces schemes to assist sectors unable to recruit from local labour.

The Seasonal Agricultural Workers Scheme referred to above focuses on agricultural and horticultural businesses, but other schemes, such as the Sectors Based Scheme which at present supports fish- and meat processing and hospitality, are, in theory at least, able to be modified to assist agriculture.

Keeping up with which scheme is operating at any given time is a minefield for employers and information needs to be checked regularly to ensure that what used to be adequate compliance still is.

**Means of identification**

The UK Border Agency has produced new lists of acceptable proofs of identification, but there are 21 different documents, some of which only satisfy the requirements if they are produced in combination with each other.

For instance, for those with the permanent right to remain (List A), a passport or national ID card by itself will be enough. A P60, P45 or NI card will do, but only if it is accompanied by some evidence of the right of permanent residence or a UK birth or adoption certificate.

For those with a limited right to stay (List B), the passport is satisfactory only if it does not also require a work permit, in which case both are required together.

From 25th November, certain foreign nationals from outside the European Economic Area (EEA) and Switzerland who are given permission to extend their stay in the United Kingdom either as students and their dependants or husbands/wives/civil partners/unmarried partners/same-sex partners of permanent residents will be issued with Identity Cards.

Employers are under a duty to check the validity of the documents and to hold copies of them, with an ongoing responsibility to check on a regular basis (at least every 12 months in the case of List B) the documentation of those employees who need permission to work.

They must also hold those records for two years after the employment has ceased. Needless to say, employers should undertake such checks in a non-discriminatory way and ask all employees to provide the necessary documents.

**A need for caution**

Even employers who believe they are complying with the rules should be cautious. If recruitment practices have not been reviewed or training given since February of this year, the chances are such employers are non-compliant.

The new rules impose more onerous checks and ongoing obligations on employers and those responsible for recruitment, and although penalties can be reduced if employers co-operate with the UK Border Agency, ignorance of the rules is no defence.

It is not enough to rely on assurances from agencies or gangmasters that they have complied with the legislation.
Instruments with a Welsh reference (W...) apply to Wales only unless otherwise stated
The date stated is the date on which the Instrument comes into force

SI2008/1718 = Eggs and Chicks (England)


SI2008/1921 = Land Registration (Proper Office) (Amendment) Order 2008 – amends


Council Regulation 485/2008 on scrutiny by Member States of transactions forming part of the system of financing by the European Agricultural Guarantee Fund

Regulation 766/2008 of the European Parliament and of the Council amending Council Regulation 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters


Commission Regulation 552/2008 amending Regulations 2430/1999, 2380/2001 and 1289/2004 as regards the terms of the authorisations of certain additives for use in animal nutrition

Commission Regulation 555/2008 laying down detailed rules for implementing Council Regulation 479/2008 on the common organisation of the market in wine as regards support programmes, trade with third countries, production potential and on controls in the wine sector

Commission Regulation 566/2008 laying down detailed rules for the application of Council Regulation 1234/2007 as regards the marketing of the meat of bovine animals aged 12 months or less


Commission Regulation 617/2008 laying down detailed rules for implementing Regulation 1234/2007 as regards marketing standards for eggs for hatching and farmyard poultry chicks


SI2008/1961 = Commons Registration (England) Regulations 2008 – make provision about registration of common land and town or village greens under Pt.1 of Commons Act 2006 (apply so far only in named pilot areas) – 1st October 2008


Commission Regulation 753/2008 amending Regulation 1299/2007 on the recognition of producer groups for hops

Commission Regulation 760/2008 laying down detailed rules for the application of Council Regulation 1234/2007 as regards authorisations for the use of casein and caseinates in the manufacture of cheeses

Commission Decision 2008/415 on a financial contribution from the Community towards emergency measures to combat avian influenza in the United Kingdom in 2007

Commission Decision 2008/418 on a financial contribution from the Community towards emergency measures to combat bluetongue in the United Kingdom in 2007

Commission Decision 2008/424 concerning protection measures in relation to highly pathogenic avian influenza of subtype H7 in the United Kingdom

Commission Decision 2008/425 laying down standard requirements for the submission by Member States of national programmes for the eradication, control and monitoring of certain animal diseases and zoonoses for Community financing

Commission Decision 2008/428 establishing the Community’s financial contribution to the expenditure incurred in the context of the emergency measures taken to combat Newcastle disease in the United Kingdom in 2005

Commission Decision 2008/442 on a financial contribution from the Community towards measures to combat foot-and-mouth disease in the United Kingdom in 2007

Commission Decision 2008/543 amending Decision 2006/415 concerning certain protection measures in relation to highly pathogenic avian influenza of the subtype H5N1 in poultry in the Community

Commission Decision 2008/582 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) and under the European Agricultural Guarantee Fund (EAGF).

Commission Decision 2008/609 amending Decision 2006/636 fixing the annual breakdown by Member State of the amount for Community support to rural development for the period from 1 January 2007 to 31 December 2013

Decisions of the EEA Joint Committee 1, 2, 21 & 40-44/2008 amending Annex I (Veterinary and phytosanitary matters) to the EEA Agreement

Decisions of the EEA Joint Committee 14, 15, 34, 35, 54 & 55/2008 amending Annex XX (Environment) to the EEA Agreement

Amendments to the Rules of Procedure of the Court of First Instance – OJ L179 (8.7.08)

Amendments to the Rules of Procedure of the Court of Justice – OJ L200 (29.7.08)

See also the following Official Journals for information regarding cases before the ECJ and the Court of First Instance: C142 (7.6.08); C158 (21.6.08); C171 (5.7.08); C183 (19.7.08); C197 (2.8.08); C209 (15.8.08); C223 (30.8.08)

1 see OJ L220, 15.8.08 for corrigendum

2 see OJ L194 (23.7.08) for corrigendum incorporating Annex
A knock at the door. Great excitement. It is the postman with the newly published third edition of Professor Christopher Rodgers’ *Agricultural Law*. Just the thing for an easy summer read on the beach. It is what *Private Eye* would describe as a rattling good yarn. The reviewer read the book from cover to cover and there constantly came to mind the lines from Oliver Goldsmith’s *The Deserted Village*:

“And still they gaz’d, and still the wonder grew,
That one small head could carry all he knew.”

It must be rare for an academic, or a practising lawyer, to be an expert in such a range of agricultural topics: land tenure, nature conservation, pollution control, the single farm payment and dairy quotas. Here they are all clearly explained, with background information on the history and policy objectives and examples of how these different areas of law impinge on one another.

The book is up to date, practical and relevant. It is divided into three sections.

**Section 1 – Introduction**

Chapter 1 gives an historical introduction of the development of agricultural tenancies from the origins of statutory intervention to the implementation of the TRIG reform proposals in 2006.

Chapter 2 gives an historical introduction to the controls on land use, both domestic and European and describes the effect EU environmental law has on agriculture.

**Section 2 – Land tenure**

Chapters 3 and 4 give a succinct and clear account of farm business tenancies. The differences between tenancies under the Agricultural Tenancies Act 1995 and tenancies governed by the Agricultural Holdings Act 1986 are highlighted.

The amendments (and the reasons for them), relating to the termination of farm business tenancies, rent reviews and compensation, made by the Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006 to the tenancy legislation are discussed under the appropriate headings.

Particularly useful is the section on the implications of the single farm payment on the drafting of clauses in tenancy agreements to protect the interests of landlords and tenants.

Chapters 5 to 9 deal with tenancies under Agricultural Holdings Act 1986. Although most of the law will be familiar to agricultural practitioners, these Chapters include new case law and the TRIG amendments relating to the application of the 1986 Act to new tenancies, rent reviews, succession tenancies, end of term compensation and arbitration.

Chapter 10 covers the esoteric subject of market gardens, allotments and smallholdings.

Chapter 11 is concerned with the complex area of housing law relating to tied cottages. These may be held as a protected agricultural occupancy, an assured agricultural occupancy or an assured shorthold tenancy. The different rules and terminology are described with admirable clarity.

**Section 3 – Land use**

For many practitioners it is these Chapters which will be of most use. Agricultural lawyers tend to be somewhat hazy on planning and environmental matters. Although there are books on planning and environmental law, they are seldom directed to the specific needs of those who advise farmers and rural landowners.

Chapter 12 describes how planning law relates to agricultural use and development, including permitted development rights and the need, in certain circumstances, for an Environmental Impact Assessment.

Chapter 13 deals with nature conservation, the designation of sites, management agreements, and development control. The relationship between planning and conservation is explored.

Pollution control, water, aerial pollution and agricultural waste is the subject of Chapter 14. The different effects of the Codes of Good Agricultural Practice on the Protection of Water, Air and Soil are discussed.

Chapters 15 and 16 set out the rules governing the single farm payment and dairy quotas and show the impact of these EU regulations on the use and transfer of agricultural land.

**Conclusion**

The Appendix deals with dispute resolution and in itself illustrates the merits of this book. The Appendix is (1) up to date in that it includes the Agricultural Land Tribunals (Rules) Order 2007 which came into effect as recently as 15th January 2008 with the new forms, (2) practical, giving a table of time limits for notices and applications under the Agricultural Holdings Act 1986, failure to comply with which can result in negligence claims against professional advisers and (3) relevant. The Arbitration Act 1996 is included which now covers not only arbitrations for farm business tenancies but also arbitrations under the Agricultural Holdings Act 1986 and those relating to milk quotas.

*Agricultural Law* should be bought by all agricultural lawyers, land agents and those concerned with land management. As well as being comprehensive and understandable, it is an invaluable source of reference for domestic law (cases, statutes, statutory instruments, policy guidance) and European law (cases, directives and regulations) relating to agricultural tenancies, subsidy payments, dairy quotas and rural environmental issues.

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